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FEDERAL ELECTION COMMISSION
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October 3, 2008

AGENDA ITEM

For Meeting of 10-08-08

MEMORANDUM

TO: The Commission

SUBMITTED LATE

FROM: Thomasenia P. Duncan *TPD by RCS*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMKnop*
Assistant General Counsel *ATB*

Jonathan M. Levin *JML by*
Senior Attorney *ATB*

Subject: Draft AO 2008-10

Attached are two alternative proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for October 8, 2008.

Attachment

October 3, 2008

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT A and DRAFT B of ADVISORY OPINION 2008-10 are available for public comments under this procedure. It was requested by Joseph M. Birkenstock, Esq., on behalf of Wide Orbit, Inc. d/b/a Voter Voter.com.

The drafts are scheduled to be on the Commission's agenda for its public meeting of Wednesday, October 8, 2008.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on October 7, 2008.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to 2008-10, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

Commission Secretary
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999 E Street, NW
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1 ADVISORY OPINION 2008-10

2
3 Joseph M. Birkenstock, Esquire

4 Caplin & Drysdale

5 One Thomas Circle, N.W.

6 Suite 1100

7 Washington, D.C. 20005

8

9 Dear Mr. Birkenstock:

DRAFT A

10 We are responding to your advisory opinion request on behalf of WideOrbit, Inc.
11 d/b/a VoterVoter.com (the "Corporation") concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to
13 advertising services provided to individuals and nonconnected political committees. The
14 Corporation asks whether a proposed plan to use the VoterVoter.com website to sell
15 political ads is permissible under the Act.

16 The Commission concludes that, under the facts presented and the conditions set
17 forth in this opinion, the Corporation's proposed services are permissible.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 August 12, 2008, publicly available materials, and telephone conversations with
21 Commission attorneys.

22 WideOrbit, Inc., a privately held corporation, sells software packages to manage
23 advertising, including the management of spot placement, inventory, sales, and the billing
24 process, at more than 1,000 television stations, radio stations, and cable networks in the
25 U.S. Building on its technical expertise and industry knowledge, WideOrbit, Inc. has
26 developed and operates an Internet service named VoterVoter.com, "to reduce the
27 technical and logistical barriers facing individuals who wish to sponsor their own

1 political advertisements, and to provide these individuals with a means to better leverage
2 the efficiency of broadcast media.” Neither WideOrbit, Inc., nor its VoterVoter.com
3 component, is owned or controlled by a candidate, political party, or political committee.¹

4 **A. General Overview of the Business Model for VoterVoter.com**

5 The VoterVoter.com website would allow individuals to view advertisements
6 already created by the Corporation, or by others, that are posted on the VoterVoter.com
7 website. These individuals may also use software tools on the VoterVoter.com website
8 to create their own political advertisements. Then, through the Corporation, individuals
9 may purchase TV airtime for the advertisements they have either chosen or created.²
10 The Corporation receives revenue in two ways: (1) by charging the airtime purchaser a
11 licensing fee for the use of ads created by the Corporation itself; and (2) by obtaining a
12 15 percent commission from the TV stations on the airtime bought by each purchaser
13 through the Corporation.³ The Corporation anticipates that the advertisements will
14 expressly advocate the election or defeat of clearly identified Federal candidates.
15 Currently, the VoterVoter.com website hosts content from creators who are individuals
16 and nonconnected political committees, but not from candidates, candidate committees,

¹ VoterVoter.com is a registered d/b/a in California for WideOrbit, Inc. Under this d/b/a, VoterVoter.com conducts business in its own name, including hiring staff, maintaining office space, and operating the website that is the subject of this advisory opinion. VoterVoter.com is not a separate business entity.

² The person who posts a video to the website is referred to as a “creator.” The person who buys airtime through the Corporation is referred to as a “purchaser.” A creator who pays to have his or her ad broadcast would be a “purchaser” as well.

³ The actual video files (including audio tracks) maintained on the VoterVoter.com website are not suitable for broadcast use. Once a customer purchases TV airtime for an advertisement, the Corporation will provide the TV station or network with a higher quality video or audio file suitable for broadcast.

1 or party committees.⁴ The Corporation does not establish or facilitate any contact
2 between the candidate whose election is advocated (including the candidate's committee
3 and agents) and the creator or purchaser. Its business model involves the creation of
4 advertisements for those who will make independent expenditures, not coordinated
5 communications. In addition, none of the advertisements will solicit contributions.

6 All of the Corporation's services are provided on a strictly non-partisan basis.
7 The Corporation states that the VoterVoter.com website and the Corporation are operated
8 for commercial purposes only and not for the purpose of influencing any Federal election.
9 The Corporation provides its services to creators and purchasers without regard to
10 partisanship or political affiliation.

11 **B. Two Kinds of Ads Available on VoterVoter.com**

12 **1. Ads Created by the Corporation**

13 To the extent a purchaser chooses an ad created by the Corporation, the
14 Corporation itself essentially serves as both the hired content creator and the media buyer
15 for that purchaser, just as media consultants might create ads for customers from stock
16 footage. The business plan contemplates that no ad will be aired on television until a
17 permissible purchaser arranges to finance its placement as an independent expenditure.
18 Also, the Corporation will charge each purchaser a "licensing fee," and will receive an
19 airtime commission that it believes will be sufficient to make a profit on each discrete
20 transaction.

⁴ In the event the Corporation decides to host ads from such committees in the future on VoterVoter.com, it will advise them (and any customers wishing to buy airtime for such ads) that any airing of a candidate's material would constitute a republication of campaign material resulting in in-kind contributions. See 2 U.S.C. 441a(a)(7)(B)(iii); 11 CFR 109.23(a).

1 The licensing fee is currently set at \$500 “per order.” An “order” may be for one
2 or more airings of a specific ad. In some instances, the expenses involved in creating an
3 ad may exceed \$500, so that the “per order” licensing fee alone would not recoup the
4 Corporation’s production costs when the first purchaser purchases placements for that ad.
5 However, the Corporation will not create a stock ad unless the future expected licensing
6 fees and airtime commissions combined, for that particular ad, provide the company with
7 a reasonable expectation of profit on the ad.

8 If a purchaser desires a completely new, customized advertisement, the
9 Corporation will arrange to have the ad created by a professional media creation
10 company. The Corporation will pass along the media creation company’s full, usual and
11 normal charge to the purchaser without markup or markdown. Accordingly, the
12 purchaser will pay the Corporation the usual and normal charge that the media creation
13 company charges to its non-political customers, and the Corporation will pass on that
14 payment to the media creation company.

15 **2. Ads Created by Others**

16 The other source of ads is creators who post their own videos on the
17 VoterVoter.com website. These creators will be either individuals or nonconnected
18 political committees. VoterVoter.com will not display the creators’ names. The
19 Corporation will charge the creator no fee for uploading videos to the website or for
20 hosting those videos once they are created and posted.⁵ When a creator posts a video, the
21 website provides the creator with brief summary information concerning the scope of the

⁵ The Corporation has not charged for the posting of any videos or other materials to VoterVoter.com or the WideOrbit, Inc. website.

1 Internet activity exemptions at 11 CFR 100.94 and 100.155 and advises that, if an
2 individual creator was paid by anyone to create that ad, such exemptions would not
3 apply.⁶ Beneath this information, the website provides a “radio button” that creators
4 must click to confirm that they were not paid by anyone else to create or post their
5 content. Unless the creator clicks that button, the site will not allow the creator to upload
6 the video.

7 Some of the ads may be created using the “mash-up” feature available on the
8 VoterVoter.com website. This feature provides creators with a range of audio and video
9 clips created by the Corporation itself, and a rudimentary editor built into the website. A
10 creator can browse through the library of clips, then click and drag them into his or her
11 own video, and combine them with new content, thereby creating a new ad. The
12 VoterVoter.com website will host the new ad alongside other ads created by creators.
13 Because the costs per creator of the mash-up feature would be miniscule and the
14 Corporation incurs no incremental costs for the use of this feature, the Corporation would
15 charge no fee for its use.

16 When a purchaser chooses an ad created by a creator, the Corporation will charge
17 no licensing fee. Because the Corporation will incur no expense to create the ad, the
18 Corporation will be compensated by the 15 percent commission it receives on the airtime
19 purchased by the purchaser.

⁶ The summary notice also states that, if a particular television airing of an ad is undertaken in coordination with any candidate or party committee, the expenses of that ad will be an in-kind contribution to the candidate or party committee with whom the ad was coordinated, and subject to the Act’s contribution limits. The notice refers the reader to information about the Internet exemptions and coordinated and independent expenditures on the Commission’s website.

1 Under the Terms of Service for use of VoterVoter.com, each creator who posts a
2 video also grants the Corporation (or warrants that the owner of such material grants to
3 the Corporation) “a royalty-free, perpetual, irrevocable and non-exclusive⁷ worldwide
4 right to use, modify, or distribute such material (in whole or in part).” The Corporation
5 will use these copyrights only in connection with its commercial endeavors, and will not
6 use these copyrights to undertake ideological or political activities of its own.

7 **C. Buying Airtime for Ads Using VoterVoter.com**

8 Once a purchaser chooses an ad to run, the Corporation will advise that airtime
9 cannot be funded by corporations or labor organizations, that any individual purchaser
10 must be either a U.S. citizen or a permanent resident and that, when broadcast, the ad will
11 include the disclaimers required by the Act.⁸ If a subsequent purchaser chooses to
12 purchase airtime for the same ad, the disclaimers will be changed to identify accurately
13 the purchaser for that particular airing of the ad.

14 The Corporation does not facilitate or promote any communication or sharing of
15 information between creators and purchasers. Although it cannot police any such
16 communications or arrangements offline, there is no mechanism on VoterVoter.com to
17 provide for such collaboration between creators and purchasers. In addition, the
18 Corporation will not provide any information to actual or prospective purchasers
19 regarding the creator of a given ad, whether any other purchasers have also bought

⁷ The creator still retains the right to use the posted ad outside of its placement on VoterVoter.com.

⁸ Specifically, the disclaimer will identify by name the person purchasing the time for the ad, provide the purchaser’s permanent street address or web address, and state that the ad was not authorized by any candidate or candidate’s committee. The authorization disclaimer required by 2 U.S.C. 441d(d)(2) and 11 CFR 110.11(c)(4) will also be provided via voice-over.

1 airtime for the ad, or the schedule under which the ad has run. Similarly, the Corporation
2 will not convey information about the purchasers of an ad, or the scheduling or airing of
3 such ads, to the creator. The Corporation will offer to provide assistance to purchasers in
4 filling out and filing FEC Form 5 (“Report of Independent Expenditures Made and
5 Contributions Received,” to be used by persons other than political committees), but
6 ultimately the responsibility for complying with the Act’s disclosure requirements rests
7 with the purchasers.

8 The Corporation will screen ads for content only to ensure that ads comply with
9 broadcast standards. For example, the website will not post any proposed ads that
10 contain nudity or profanity, but will not create or screen ads on the basis of their political
11 content or on the basis of which candidates or party committees the ads support or
12 oppose.

13 ***Questions Presented***

- 14 1. *Will the Corporation act solely as a commercial vendor when it creates ads for*
15 *which purchasers may buy airtime?*
- 16 2. *Are costs individuals incur in creating the ads posted on VoterVoter.com exempt*
17 *from the definitions of “contribution” and “expenditure”?*
- 18 3. *For the purposes of the definition of “political committee” at 2 U.S.C. 431(4),*
19 *will the Corporation and an advertisement’s creator and its purchaser become a “group*
20 *of persons” if there is no communication or prearrangement between the purchaser and*
21 *the creator?*
- 22 4. *If purchasers using VoterVoter.com obtain airtime for an ad that was already*

1 *purchased by other purchasers using VoterVoter.com after reviewing FEC Form 5s filed*
2 *by those other purchasers, are all these purchasers a "group of persons" for purposes of*
3 *the definition of "political committee," even if there is no direct communication or*
4 *prearrangement between the purchasers themselves, and the Corporation has not*
5 *communicated with any purchaser about airtime orders or purchases by others?*

6 5. *If a nonconnected political committee posts an ad on VoterVoter.com that omits*
7 *any mention of the political committee's name, logo, or any other identification (other*
8 *than in a required disclaimer), does an individual purchaser who pays to broadcast that*
9 *ad make an in-kind contribution to the nonconnected political committee?*

10 6. (a) *Does the use of footage of a candidate at a public appearance, in an ad posted*
11 *on VoterVoter.com constitute republication of campaign materials?*

12 (b) *Would this analysis change if the footage includes images of campaign*
13 *materials, such as banners, signs, buttons, or t-shirts, either in the background or worn*
14 *by the candidate at the event?*

15 ***Legal Analysis and Conclusions***

16 1. *Will the Corporation act solely as a commercial vendor when it creates ads for*
17 *which purchasers may buy airtime?*

18 Under the conditions set forth in this opinion, the Corporation would be
19 considered a commercial vendor engaging in *bona fide* commercial activity and therefore
20 may create ads, and display ads created and posted by individuals, for purchase.

21 The Act and Commission regulations prohibit a corporation from making
22 contributions or expenditures in connection with a Federal election. 2 U.S.C. 441b(a);

1 11 CFR 114.2(b). An exception to this prohibition permits a corporation to communicate
2 with its stockholders, executive and administrative personnel, and the families of such
3 individuals (“restricted class”) on any subject, including communications expressly
4 advocating the election or defeat of a clearly identified Federal candidate. 2 U.S.C.
5 441b(b)(2)(A) and 431(9)(B)(iii); 11 CFR 114.3(a) and (c), 100.134(a), and 114.1(j).
6 With a few exceptions not applicable here, corporations are prohibited from making
7 express advocacy communications to those outside the restricted class. *See* 11 CFR
8 114.4.⁹

9 Under the Corporation's proposed business model, the ads created by the
10 Corporation will be available to the general public on the VoterVoter.com website, which
11 is a corporate website of WideOrbit, Inc. In addition, the ads posted by creators will also
12 be displayed on VoterVoter.com’s website for viewing by the general public.¹⁰
13 However, the Commission has concluded that the distribution of express advocacy
14 messages to the general public is permissible as “*bona fide* commercial activity,” if done
15 by an entity organized and maintained for commercial purposes only and not for the
16 purpose of
17 influencing any elections, and the activities themselves are for purely commercial
18 purposes.

⁹ The Commission notes that the “Internet activity” exemption described below does not affect the regulations governing corporate communications within and outside of the restricted class. *See Explanation and Justification for Final Rules on Internet Communications (“Internet Rulemaking”)*, 71 Fed. Reg. 1858 at 18591, 18600, 18601, and 18612 (April 12, 2006). *See also* 11 CFR 114.9(e).

¹⁰ The Commission notes that neither WideOrbit, Inc. nor VoterVoter.com is a press entity, performing a press function, in displaying these ads so such activity is not exempt from the definition of “contribution” or “expenditure” under the press exemption. *See* 2 U.S.C. 431(9)(B)(i); 11 CFR 100.73 and 100.132; *see also* Advisory Opinion 2007-20 (XM Radio).

1 For example, in the context of the manufacture, advertising, and sale of political
2 paraphernalia, such as t-shirts and bumper stickers containing express advocacy, the
3 Commission explained that whether or not certain commercial activity results in an
4 expenditure or contribution depended upon a number of factors including: (1) whether the
5 activity is engaged in by the vendor for genuinely commercial purposes and not for the
6 purpose of influencing an election; (2) whether the sales of the merchandise involved
7 fundraising activity for candidates (*e.g.*, resulting in the transfer of proceeds to
8 candidates) or solicitations for political contributions; (3) whether the items are sold at
9 the vendor's usual and normal charge; and (4) whether the purchases are made by
10 individuals for their personal use. *See* Advisory Opinions 1994-30 (Conservative
11 Concepts/Pence) and 1989-21 (Create-a-Craft). Other factors considered in concluding
12 that a business entity's activities were *bona fide* commercial activities, rather than
13 corporate expenditures, have included whether the entities: (1) were owned, controlled, or
14 affiliated with a candidate or political committee; (2) were "in the business" of
15 conducting the type of activity involved; and (3) followed usual and normal business
16 practices and industry standards. *See* MURs 5474 and 5539 (Dog Eat Dog Films/Michael
17 Moore), General Counsel's Report, dated May 25, 2005; MUR 5485 (Conversagent),
18 General Counsel's Report, dated October 25, 2005.

19 Here, the facts set out in the request indicate the Corporation will be acting as a
20 commercial vendor engaging in the proposed activity for genuinely commercial purposes

1 and not for the purpose of influencing any Federal election.¹¹ Neither WideOrbit, Inc.
2 nor VoterVoter.com is owned or controlled by any candidate, political party, or political
3 committee. The Corporation's business model does not involve fundraising for, or the
4 transfer of proceeds to, any candidate or political committee. The Corporation will sell
5 television airtime to the purchasers at the usual and normal charge, and the purchasers
6 will pay the Corporation in advance of the Corporation's purchase of the media time
7 requested for the ads and, hence, in advance of the airing of the ads. These practices are
8 consistent with the usual and normal industry practice as to payment for TV ad airtime.

9 In the context of this request, which involves a corporation posting express
10 advocacy messages on a website viewable by the general public, it is also significant that
11 the Corporation will accept and post ads on a nonpartisan basis. To maximize its
12 prospective revenues, the Corporation seeks to attract creators without regard to the
13 candidates their ads support or oppose. The Commission also notes that the Corporation
14 has itself posted ads on the website supporting both major party presidential nominees
15 and, before the major party national conventions, ads supporting another presidential
16 candidate, Senator Clinton. Thus, it appears that the Corporation intends to create ads for

¹¹ See 11 CFR 116.1(c), which defines "commercial vendor," for the purposes of permissible extensions of credit to political committees, as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services. See also 11 CFR 114.2(f)(1) (providing that a corporation does not facilitate contributions to a candidate or political committee if it provides services in the ordinary course of business as a commercial vendor at the usual and normal charge). Although VoterVoter.com was formed only a few months ago and does not yet account for a significant part of WideOrbit, Inc.'s business, the operations of VoterVoter.com are a natural outgrowth of WideOrbit, Inc.'s business of making more efficient the TV and radio advertising process. In addition, VoterVoter.com is a way for WideOrbit, Inc. to build on its pre-existing relationship with TV stations to commercial advantage.

1 the purpose of maximizing its commercial success, not for the purpose of supporting
2 candidates.¹²

3 To avoid making a corporate expenditure, an incorporated commercial vendor
4 must charge no less than the usual and normal charge for its services. *See* 11 CFR
5 100.111 and 114.2(b)(2)(i). It appears that the Corporation intends for transactions with
6 respect to each ad to provide a profit with respect to that ad, and not to rely on the profits
7 from some ads to cover losses from other ads. To avoid a corporate expenditure in the
8 normal circumstance where persons pay for the production and airtime costs of their own
9 ads, media vendors customarily price their services so as to rely solely on profits from
10 that transaction to cover costs. The Commission thus conditions its approval of the
11 Corporation's proposal on its representation as to the commercial viability of each ad.
12 *See* Advisory Opinion 2006-34 (Working Assets).

13 The Corporation must also receive confirmation that neither the creators nor the
14 purchasers use funds from prohibited sources to pay for the creation of the ads or the
15 purchase of airtime. *See* Advisory Opinions 2007-04 (Atlatl), 2004-19 (DollarVote), and
16 2002-07 (Careau) (requiring screening and verification procedures to prevent the making
17 of prohibited contributions and to ensure that such contributions are not being
18 forwarded). Although the Corporation will not allow a creator to post an ad if the creator
19 does not confirm that he or she was not paid by anyone else to create or post the content,
20 the Corporation must also receive confirmation that the funds used (if any) in the creation
21 of the ad are not from a source prohibited by the Act, *e.g.*, a corporation, foreign national,

¹² The Commission understands that WideOrbit, Inc., through VoterVoter.com, would also create ads advocating the election of minor party candidates, if the Corporation determines that offering them would increase its net revenues.

1 or Federal contractor. In addition, the Corporation must receive confirmation from the
2 purchaser that he or she is not a foreign national or Federal contractor, did not receive
3 funds from another source (unless that purchaser is identified as a co-purchaser), and did
4 not use funds from a prohibited source to purchase the airtime (e.g., through use of funds
5 from another source or use of a corporate account or a credit card not belonging to the
6 purchaser). These confirmations are necessary to ensure that only permissible funds are
7 used to make the independent expenditures.

8 2. *Are costs individuals incur in creating the ads posted on VoterVoter.com exempt*
9 *from the definitions of "contribution" and expenditure"?*

10 The costs incurred by an individual in creating an ad will be covered by the
11 Internet exemption from the definition of "expenditure" as long as the creator is not also
12 purchasing TV airtime for the ad he or she created.

13 Commission regulations provide that, if an individual or a group of individuals
14 engages in uncompensated Internet activities for the purpose of influencing a Federal
15 election, neither the uncompensated personal services provided by the individual nor,
16 generally speaking, the individual's use of equipment or services for the uncompensated
17 activity will be a "contribution" or "expenditure" by that individual or group of
18 individuals. 11 CFR 100.94 and 100.155. This exemption does not apply to several
19 types of payments, including payments for "public communications." 11 CFR
20 100.94(e)(1) and 100.155(e)(1). However, communications over the Internet are not
21 "public communications," except for communications placed for a fee on another
22 person's website. See 11 CFR 100.26.

1 The posting by an uncompensated individual or group of individuals of ads
2 created by them on the VoterVoter.com website, where such ads are not posted for a fee,
3 would not be a contribution or expenditure by the individual(s) at the time of the
4 posting.¹³ However, if the creator then pays to have the ad broadcast on television the
5 individual's costs in creating the ad will no longer be covered by the Internet exemption,
6 and these costs will be part of the expenses for an independent expenditure. *See* 11 CFR
7 109.10; *see also* 104.4(f) and 100.29(b)(3) (which defines "publicly distributed" for
8 electioneering communications but is also applicable to independent expenditures).

9 If a political committee posts an ad it creates on VoterVoter.com, its costs will
10 constitute expenditures and will be reportable as such, even if the ad is never televised.
11 Please note that the Internet activity exemptions in 11 CFR 100.94 and 100.155 do not
12 apply to political committees. If the creator is a political committee that has made any
13 payments for the creation of an advertisement that is aired on television, the ad's written
14 and voice-over disclaimers must include the creator as a payor, as well as the purchaser.
15 In addition to stating the name and address (or telephone number) of the person
16 purchasing the particular airtime, the disclaimer must state the same information for the
17 political committee creator, and the ad must include the name of both the purchaser and
18 the political committee creator in the required voice-over and in the written statement of

¹³ It is also significant that WideOrbit, Inc. and VoterVoter.com have never charged for the posting of any videos or other materials to VoterVoter.com or the WideOrbit website. If they had a customary practice of charging for such posting, the Corporation's allowance for free posting would constitute an impermissible corporate expenditure. *See* 2 U.S.C. 441b(a) and (b)(2); 11 CFR 100.111(a) and (e), 114.2(b)(2). *See also Internet Rulemaking*, 71 Fed. Reg. at 18599 (stating that that a vendor would make an in-kind contribution to a political committee if the vendor allowed free use of website space outside the vendor's customary business practice).

1 that voice-over. 2 U.S.C. 441d(a)(3) and (d)(2); 11 CFR 110.11(b)(3) and (c)(4); *see also*
2 Advisory Opinion 2007-20 (XM Radio).

3 3. *For the purposes of the definition of "political committee" at 2 U.S.C. 431(4),*
4 *will the Corporation and an advertisement's creator and its purchaser become a "group*
5 *of persons" if there is no communication or prearrangement between the purchaser and*
6 *the creator?*

7 Where there is no communication or prearrangement between the creator and the
8 purchaser of the ad, and the Corporation has not conveyed any information about the
9 creator to the purchaser or *vice versa* (other than the creator's name, address, and costs for
10 reporting purposes), the purchaser may run an ad without the Corporation and the ad's
11 creator and purchaser becoming a "group" for purposes of the definition of "political
12 committee."

13 The Act and Commission regulations define a "political committee" as "any
14 committee, club, association, or other group of persons which receives contributions
15 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
16 aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. 431(4)(A); 11 CFR
17 100.5(a). The Supreme Court construed the term "political committee" to "encompass
18 [only] organizations that are under the control of a candidate or whose major purpose is
19 the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). In
20 addressing a non-profit, incorporated issue advocacy organization that made independent
21 expenditures, the Court stated that, if the organization's independent spending became so
22 extensive that its major purpose could be regarded as campaign activity, the organization

1 would be a “political committee” and subject to the obligations and restrictions applicable
2 to such groups. *Federal Election Commission v. Massachusetts Citizens for Life*, 479
3 U.S. 238, 262 (1986).

4 If the creator and a purchaser cooperated on the placement of one or more express
5 advocacy communications, they might constitute a “group of persons” whose major
6 purpose was the election or defeat of candidates and hence constitute a “political
7 committee.” Here, under the facts presented, however, it appears that no “political
8 committee” will be created through the Corporation’s activities. The Corporation will
9 not facilitate communications or arrangements between the creator and the purchaser. In
10 addition, the Corporation will not convey (with the exception of contribution information
11 described in response to question 5 at footnote 14) any information to actual or
12 prospective purchasers about the creator, or other actual or prospective purchasers, or
13 previous placements of the ad. Moreover, the Corporation will not convey to the creator
14 any information about the purchasers of an ad, or the scheduling or airing of such ads.

15 4. *If purchasers using VoterVoter.com obtain airtime for an ad that was already*
16 *purchased by other purchasers using VoterVoter.com after reviewing FEC Form 5s filed*
17 *by those other purchasers, are all these purchasers a “group of persons” for purposes of*
18 *the definition of “political committee,” even if there is no direct communication or*
19 *prearrangement between the purchasers themselves, and the Corporation has not*
20 *communicated with any purchaser about airtime orders or purchases by others?*

21 Subsequent purchasers of ads may choose to review the FEC Form 5s filed by
22 previous purchasers. However, if there is no communication between or among the

1 purchasers themselves, and the Corporation has not communicated with purchasers about
2 other purchasers, the mere review of FEC Form 5s would not be sufficient to cause
3 previous and new purchasers of the same ad to be considered a “group of persons” and
4 hence a political committee. The Commission does not address whether any
5 communications or collaboration between purchasers would result in the formation of a
6 “group of persons” that could be considered a political committee.

7 *5. If a nonconnected political committee posts an ad on VoterVoter.com that omits*
8 *any mention of the political committee's name, logo, or any other identification, does an*
9 *individual purchaser who pays to broadcast that ad make an in-kind contribution to the*
10 *nonconnected political committee?*

11 Yes, if a nonconnected political committee posts an ad on VoterVoter.com, a
12 purchaser who buys airtime to run that ad would make an in-kind contribution to the
13 political committee that created and posted it.

14 The Commission notes that a person who purchases airtime and runs an ad
15 obtained directly from a political committee would make an in-kind contribution to the
16 committee. The purchaser would enable the committee’s ad to be aired, and thus would
17 provide the committee with something of value for the purpose of influencing an election.
18 Similarly, here, the purchaser who buys airtime through the Corporation to run the
19 committee’s ad will provide the committee with something of value. The committee will

1 have posted the ad with the intention that another person would pay to have the ad
2 televised, so that the committee itself would not have to spend such funds.¹⁴

3 The Commission notes that, when the ad created by the political committee is
4 posted on the website, the ad is not posted for a fee. Thus, the ad is not general public
5 political advertising, and therefore is not a public communication under 11 CFR 100.26.
6 See 2 U.S.C. 431(22). Accordingly, a disclaimer need not appear on the ad posted on the
7 website. See 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1) and (2).

8 *6a. Does the use of footage of a candidate at a public appearance, in an ad posted on*
9 *VoterVoter.com, constitute republication of campaign materials?*

10 No, if an individual independently creates and uses his or her own footage of a
11 candidate at a public appearance in an ad he or she posts on VoterVoter.com, the footage
12 would not constitute candidate campaign materials. Hence its use would not constitute
13 republication of campaign materials by either the creator or a subsequent purchaser of
14 airtime for the ad.

15 The Act and Commission regulations provide that, with limited exceptions not
16 implicated here, the dissemination, distribution, or republication, in whole or in part, of
17 campaign materials prepared by a candidate or the candidate's authorized committee, is a
18 contribution by the person republishing the campaign materials for the purposes of the
19 Act's limitations and his or her reporting responsibilities, regardless of whether such
20 republication is a "coordinated communication." 2 U.S.C. 441a(a)(7)(B)(iii); 11 CFR

¹⁴ When a purchaser informs the Corporation that it wishes to purchase airtime for the ad, the Corporation needs to inform the purchaser that the purchaser would be making a contribution to the particular political committee, subject to the Act's limits. See 2 U.S.C. 441a(a)(1)(C). If the purchase is actually made, the Corporation also needs to inform the political committee of the contribution date, amount, and the contributor's identifying information. See 11 CFR 104.3(a)(4).

1 109.23.¹⁵ Here, as long as the creator is acting on his or her own behalf in creating the
2 footage and neither the candidate nor his or her authorized committee, or any agent acting
3 on behalf of either, would have any ownership or other rights to the footage, the ad would
4 not constitute the dissemination, distribution or republishing of campaign materials.

5 *6b. Would this analysis change if the footage includes images of campaign materials,*
6 *such as banners, signs, buttons, or t-shirts, either in the background or worn by the*
7 *candidate at the event?*

8 No. If the footage includes images of campaign materials, such as campaign
9 signs, buttons, or t-shirts with slogans, at the public appearance, the use of the footage
10 would not thereby become a republication of campaign materials.

11 At campaign rallies or other candidate events, it is customary for banners and
12 signs to be displayed and for attendees to wear campaign buttons, t-shirts, and other
13 campaign apparel. Film footage of such a candidate appearance would not constitute a
14 republication of campaign materials by the creator or the purchaser unless the creator
15 arranged for such materials to be displayed, held up, or worn at the event for the purpose
16 of being shown in the ad.

17 This response constitutes an advisory opinion concerning the application of the
18 Act and Commission regulations to the specific transaction or activity set forth in your
19 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

¹⁵ When a creator posts an ad on the website, the Corporation must ask the creator whether the ad posted constitutes a republication. If it does, the Corporation needs to inform: (1) political committee creators that the production costs will be a contribution to the candidate subject to the Act's limits; and (2) persons deciding to purchase airtime for the ad that their purchase would be a contribution subject to the Act's limits. In addition, if the republication is both a public communication and a coordinated communication, it may need to be reported by the candidate as well. *See* 11 CFR 109.21(a), (c)(2), and (d)(6) and 109.23.

1 of the facts or assumptions presented, and such facts or assumptions are material to a
2 conclusion presented in this advisory opinion, then the requestor may not rely on that
3 conclusion as support for its proposed activity. Any person involved in any specific
4 transaction or activity which is indistinguishable in all its material aspects from the
5 transaction or activity with respect to which this advisory opinion is rendered may rely on
6 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
7 conclusions in this advisory opinion may be affected by subsequent developments in the
8 law including, but not limited to, statutes, regulations, advisory opinions and case law.
9 All cited advisory opinions are available on the Commission's website at
10 <http://saos.nictusa.com/saos/searchao>.

11 On behalf of the Commission,
12
13 Donald F. McGahn II
14 Chairman

1 ADVISORY OPINION 2008-10

2

3 Joseph M. Birkenstock, Esquire

4 Caplin & Drysdale

5 One Thomas Circle, N.W.

DRAFT B

6 Suite 1100

7 Washington, D.C. 20005

8

9 Dear Mr. Birkenstock:

10 We are responding to your advisory opinion request on behalf of WideOrbit, Inc.
11 d/b/a VoterVoter.com (the "Corporation") concerning the application of the Federal
12 Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to
13 advertising services provided to individuals and nonconnected political committees. The
14 Corporation asks whether a proposed plan to use the VoterVoter.com website to sell
15 political ads is permissible under the Act.

16 The Commission concludes that, under the facts presented and the conditions set
17 forth in this opinion, the Corporation's proposed services are permissible.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 August 12, 2008, publicly available materials, and telephone conversations with
21 Commission attorneys.

22 WideOrbit, Inc., a privately held corporation, sells software packages to manage
23 advertising, including the management of spot placement, inventory, sales, and the billing
24 process, at more than 1,000 television stations, radio stations, and cable networks in the
25 U.S. Building on its technical expertise and industry knowledge, WideOrbit, Inc. has
26 developed and operates an Internet service named VoterVoter.com, "to reduce the
27 technical and logistical barriers facing individuals who wish to sponsor their own

1 political advertisements, and to provide these individuals with a means to better leverage
2 the efficiency of broadcast media.” Neither WideOrbit, Inc., nor its VoterVoter.com
3 component, is owned or controlled by a candidate, political party, or political committee.¹

4 **A. General Overview of the Business Model for VoterVoter.com**

5 The VoterVoter.com website would allow individuals to view advertisements
6 already created by the Corporation, or by others, that are posted on the VoterVoter.com
7 website. These individuals may also use software tools on the VoterVoter.com website
8 to create their own political advertisements. Then, through the Corporation, individuals
9 may purchase TV airtime for the advertisements they have either chosen or created.²
10 The Corporation receives revenue in two ways: (1) by charging the airtime purchaser a
11 licensing fee for the use of ads created by the Corporation itself; and (2) by obtaining a
12 15 percent commission from the TV stations on the airtime bought by each purchaser
13 through the Corporation.³ The Corporation anticipates that the advertisements will
14 expressly advocate the election or defeat of clearly identified Federal candidates.
15 Currently, the VoterVoter.com website hosts content from creators who are individuals
16 and nonconnected political committees, but not from candidates, candidate committees,

¹ VoterVoter.com is a registered d/b/a in California for WideOrbit, Inc. Under this d/b/a, VoterVoter.com conducts business in its own name, including hiring staff, maintaining office space, and operating the website that is the subject of this advisory opinion. VoterVoter.com is not a separate business entity.

² The person who posts a video to the website is referred to as a “creator.” The person who buys airtime through the Corporation is referred to as a “purchaser.” A creator who pays to have his or her ad broadcast would be a “purchaser” as well.

³ The actual video files (including audio tracks) maintained on the VoterVoter.com website are not suitable for broadcast use. Once a customer purchases TV airtime for an advertisement, the Corporation will provide the TV station or network with a higher quality video or audio file suitable for broadcast.

1 or party committees.⁴ The Corporation does not establish or facilitate any contact
2 between the candidate whose election is advocated (including the candidate's committee
3 and agents) and the creator or purchaser. Its business model involves the creation of
4 advertisements for those who will make independent expenditures, not coordinated
5 communications. In addition, none of the advertisements will solicit contributions.

6 All of the Corporation's services are provided on a strictly non-partisan basis.
7 The Corporation states that the VoterVoter.com website and the Corporation are operated
8 for commercial purposes only and not for the purpose of influencing any Federal election.
9 The Corporation provides its services to creators and purchasers without regard to
10 partisanship or political affiliation.

11 **B. Two Kinds of Ads Available on VoterVoter.com**

12 **1. Ads Created by the Corporation**

13 To the extent a purchaser chooses an ad created by the Corporation, the
14 Corporation itself essentially serves as both the hired content creator and the media buyer
15 for that purchaser, just as media consultants might create ads for customers from stock
16 footage. The business plan contemplates that no ad will be aired on television until a
17 permissible purchaser arranges to finance its placement as an independent expenditure.
18 Also, the Corporation will charge each purchaser a "licensing fee," and will receive an
19 airtime commission that it believes will be sufficient to make a profit on each discrete
20 transaction.

⁴ In the event the Corporation decides to host ads from such committees in the future on VoterVoter.com, it will advise them (and any customers wishing to buy airtime for such ads) that any airing of a candidate's material would constitute a republication of campaign material resulting in in-kind contributions. See 2 U.S.C. 441a(a)(7)(B)(iii); 11 CFR 109.23(a).

1 The licensing fee is currently set at \$500 “per order.” An “order” may be for one
2 or more airings of a specific ad. In some instances, the expenses involved in creating an
3 ad may exceed \$500, so that the “per order” licensing fee alone would not recoup the
4 Corporation’s production costs when the first purchaser purchases placements for that ad.
5 However, the Corporation will not create a stock ad unless the future expected licensing
6 fees and airtime commissions combined, for that particular ad, provide the company with
7 a reasonable expectation of profit on the ad.

8 If a purchaser desires a completely new, customized advertisement, the
9 Corporation will arrange to have the ad created by a professional media creation
10 company. The Corporation will pass along the media creation company’s full, usual and
11 normal charge to the purchaser without markup or markdown. Accordingly, the
12 purchaser will pay the Corporation the usual and normal charge that the media creation
13 company charges to its non-political customers, and the Corporation will pass on that
14 payment to the media creation company.

15 **2. Ads Created by Others**

16 The other source of ads is creators who post their own videos on the
17 VoterVoter.com website. These creators will be either individuals or nonconnected
18 political committees. VoterVoter.com will not display the creators’ names. The
19 Corporation will charge the creator no fee for uploading videos to the website or for
20 hosting those videos once they are created and posted.⁵ When a creator posts a video, the
21 website provides the creator with brief summary information concerning the scope of the

⁵ The Corporation has not charged for the posting of any videos or other materials to VoterVoter.com or the WideOrbit, Inc. website.

1 Internet activity exemptions at 11 CFR 100.94 and 100.155 and advises that, if an
2 individual creator was paid by anyone to create that ad, such exemptions would not
3 apply.⁶ Beneath this information, the website provides a “radio button” that creators
4 must click to confirm that they were not paid by anyone else to create or post their
5 content. Unless the creator clicks that button, the site will not allow the creator to upload
6 the video.

7 Some of the ads may be created using the “mash-up” feature available on the
8 VoterVoter.com website. This feature provides creators with a range of audio and video
9 clips created by the Corporation itself, and a rudimentary editor built into the website. A
10 creator can browse through the library of clips, then click and drag them into his or her
11 own video, and combine them with new content, thereby creating a new ad. The
12 VoterVoter.com website will host the new ad alongside other ads created by creators.
13 Because the costs per creator of the mash-up feature would be miniscule and the
14 Corporation incurs no incremental costs for the use of this feature, the Corporation would
15 charge no fee for its use.

16 When a purchaser chooses an ad created by a creator, the Corporation will charge
17 no licensing fee. Because the Corporation will incur no expense to create the ad, the
18 Corporation will be compensated by the 15 percent commission it receives on the airtime
19 purchased by the purchaser.

⁶ The summary notice also states that, if a particular television airing of an ad is undertaken in coordination with any candidate or party committee, the expenses of that ad will be an in-kind contribution to the candidate or party committee with whom the ad was coordinated, and subject to the Act’s contribution limits. The notice refers the reader to information about the Internet exemptions and coordinated and independent expenditures on the Commission’s website.

1 Under the Terms of Service for use of VoterVoter.com, each creator who posts a
2 video also grants the Corporation (or warrants that the owner of such material grants to
3 the Corporation) “a royalty-free, perpetual, irrevocable and non-exclusive⁷ worldwide
4 right to use, modify, or distribute such material (in whole or in part).” The Corporation
5 will use these copyrights only in connection with its commercial endeavors, and will not
6 use these copyrights to undertake ideological or political activities of its own.

7 **C. Buying Airtime for Ads Using VoterVoter.com**

8 Once a purchaser chooses an ad to run, the Corporation will advise that airtime
9 cannot be funded by corporations or labor organizations, that any individual purchaser
10 must be either a U.S. citizen or a permanent resident and that, when broadcast, the ad will
11 include the disclaimers required by the Act.⁸ If a subsequent purchaser chooses to
12 purchase airtime for the same ad, the disclaimers will be changed to identify accurately
13 the purchaser for that particular airing of the ad.

14 The Corporation does not facilitate or promote any communication or sharing of
15 information between creators and purchasers. Although it cannot police any such
16 communications or arrangements offline, there is no mechanism on VoterVoter.com to
17 provide for such collaboration between creators and purchasers. In addition, the
18 Corporation will not provide any information to actual or prospective purchasers
19 regarding the creator of a given ad, whether any other purchasers have also bought

⁷ The creator still retains the right to use the posted ad outside of its placement on VoterVoter.com.

⁸ Specifically, the disclaimer will identify by name the person purchasing the time for the ad, provide the purchaser’s permanent street address or web address, and state that the ad was not authorized by any candidate or candidate’s committee. The authorization disclaimer required by 2 U.S.C. 441d(d)(2) and 11 CFR 110.11(c)(4) will also be provided via voice-over.

1 airtime for the ad, or the schedule under which the ad has run. Similarly, the Corporation
2 will not convey information about the purchasers of an ad, or the scheduling or airing of
3 such ads, to the creator. The Corporation will offer to provide assistance to purchasers in
4 filling out and filing FEC Form 5 (“Report of Independent Expenditures Made and
5 Contributions Received,” to be used by persons other than political committees), but
6 ultimately the responsibility for complying with the Act’s disclosure requirements rests
7 with the purchasers.

8 The Corporation will screen ads for content only to ensure that ads comply with
9 broadcast standards. For example, the website will not post any proposed ads that
10 contain nudity or profanity, but will not create or screen ads on the basis of their political
11 content or on the basis of which candidates or party committees the ads support or
12 oppose.

13 ***Questions Presented***

- 14 1. *Will the Corporation act solely as a commercial vendor when it creates ads for*
15 *which purchasers may buy airtime?*
- 16 2. *Are costs individuals incur in creating the ads posted on VoterVoter.com exempt*
17 *from the definitions of “contribution” and “expenditure”?*
- 18 3. *For the purposes of the definition of “political committee” at 2 U.S.C. 431(4),*
19 *will the Corporation and an advertisement’s creator and its purchaser become a “group*
20 *of persons” if there is no communication or prearrangement between the purchaser and*
21 *the creator?*
- 22 4. *If purchasers using VoterVoter.com obtain airtime for an ad that was already*

1 *purchased by other purchasers using VoterVoter.com after reviewing FEC Form 5s filed*
2 *by those other purchasers, are all these purchasers a "group of persons" for purposes of*
3 *the definition of "political committee," even if there is no direct communication or*
4 *prearrangement between the purchasers themselves, and the Corporation has not*
5 *communicated with any purchaser about airtime orders or purchases by others?*

6 5. *If a nonconnected political committee posts an ad on VoterVoter.com that omits*
7 *any mention of the political committee's name, logo, or any other identification (other*
8 *than in a required disclaimer), does an individual purchaser who pays to broadcast that*
9 *ad make an in-kind contribution to the nonconnected political committee?*

10 6. (a) *Does the use of footage of a candidate at a public appearance, in an ad posted*
11 *on VoterVoter.com constitute republication of campaign materials?*

12 (b) *Would this analysis change if the footage includes images of campaign*
13 *materials, such as banners, signs, buttons, or t-shirts, either in the background or worn*
14 *by the candidate at the event?*

15 ***Legal Analysis and Conclusions***

16 1. *Will the Corporation act solely as a commercial vendor when it creates ads for*
17 *which purchasers may buy airtime?*

18 Under the conditions set forth in this opinion, the Corporation would be
19 considered a commercial vendor engaging in *bona fide* commercial activity and therefore
20 may create ads, and display ads created and posted by individuals, for purchase.

21 The Act and Commission regulations prohibit a corporation from making
22 contributions or expenditures in connection with a Federal election. 2 U.S.C. 441b(a);

1 11 CFR 114.2(b). An exception to this prohibition permits a corporation to communicate
2 with its stockholders, executive and administrative personnel, and the families of such
3 individuals (“restricted class”) on any subject, including communications expressly
4 advocating the election or defeat of a clearly identified Federal candidate. 2 U.S.C.
5 441b(b)(2)(A) and 431(9)(B)(iii); 11 CFR 114.3(a) and (c), 100.134(a), and 114.1(j).
6 With a few exceptions not applicable here, corporations are prohibited from making
7 express advocacy communications to those outside the restricted class. *See* 11 CFR
8 114.4.⁹

9 Under the Corporation's proposed business model, the ads created by the
10 Corporation will be available to the general public on the VoterVoter.com website, which
11 is a corporate website of WideOrbit, Inc. In addition, the ads posted by creators will also
12 be displayed on VoterVoter.com's website for viewing by the general public.¹⁰
13 However, the Commission has concluded that the distribution of express advocacy
14 messages to the general public is permissible as “*bona fide* commercial activity,” if done
15 by an entity organized and maintained for commercial purposes only and not for the
16 purpose of

⁹ The Commission notes that the “Internet activity” exemption described below does not affect the regulations governing corporate communications within and outside of the restricted class. *See Explanation and Justification for Final Rules on Internet Communications (“Internet Rulemaking”),* 71 Fed. Reg. 1858 at 18591, 18600, 18601, and 18612 (April 12, 2006). *See also* 11 CFR 114.9(e).

¹⁰ The Commission notes that neither WideOrbit, Inc. nor VoterVoter.com is a press entity, performing a press function, in displaying these ads so such activity is not exempt from the definition of “contribution” or “expenditure” under the press exemption. *See* 2 U.S.C. 431(9)(B)(i); 11 CFR 100.73 and 100.132; *see also* Advisory Opinion 2007-20 (XM Radio).

1 influencing any elections, and the activities themselves are for purely commercial
2 purposes.

3 For example, in the context of the manufacture, advertising, and sale of political
4 paraphernalia, such as t-shirts and bumper stickers containing express advocacy, the
5 Commission explained that whether or not certain commercial activity results in an
6 expenditure or contribution depended upon a number of factors including: (1) whether the
7 activity is engaged in by the vendor for genuinely commercial purposes and not for the
8 purpose of influencing an election; (2) whether the sales of the merchandise involved
9 fundraising activity for candidates (*e.g.*, resulting in the transfer of proceeds to
10 candidates) or solicitations for political contributions; (3) whether the items are sold at
11 the vendor's usual and normal charge; and (4) whether the purchases are made by
12 individuals for their personal use. *See* Advisory Opinions 1994-30 (Conservative
13 Concepts/Pence) and 1989-21 (Create-a-Craft). Other factors considered in concluding
14 that a business entity's activities were *bona fide* commercial activities, rather than
15 corporate expenditures, have included whether the entities: (1) were owned, controlled, or
16 affiliated with a candidate or political committee; (2) were "in the business" of
17 conducting the type of activity involved; and (3) followed usual and normal business
18 practices and industry standards. *See* MURs 5474 and 5539 (Dog Eat Dog Films/Michael
19 Moore), General Counsel's Report, dated May 25, 2005; MUR 5485 (Conversagent),
20 General Counsel's Report, dated October 25, 2005.

21 Here, the facts set out in the request indicate the Corporation will be acting as a
22 commercial vendor engaging in the proposed activity for genuinely commercial purposes

1 and not for the purpose of influencing any Federal election.¹¹ Neither WideOrbit, Inc.
2 nor VoterVoter.com is owned or controlled by any candidate, political party, or political
3 committee. The Corporation's business model does not involve fundraising for, or the
4 transfer of proceeds to, any candidate or political committee. The Corporation will sell
5 television airtime to the purchasers at the usual and normal charge, and the purchasers
6 will pay the Corporation in advance of the Corporation's purchase of the media time
7 requested for the ads and, hence, in advance of the airing of the ads. These practices are
8 consistent with the usual and normal industry practice as to payment for TV ad airtime.

9 In the context of this request, which involves a corporation posting express
10 advocacy messages on a website viewable by the general public, it is also significant that
11 the Corporation will accept and post ads on a nonpartisan basis. To maximize its
12 prospective revenues, the Corporation seeks to attract creators without regard to the
13 candidates their ads support or oppose. The Commission also notes that the Corporation
14 has itself posted ads on the website supporting both major party presidential nominees
15 and, before the major party national conventions, ads supporting another presidential
16 candidate, Senator Clinton. Thus, it appears that the Corporation intends to create ads for

¹¹ See 11 CFR 116.1(c), which defines "commercial vendor," for the purposes of permissible extensions of credit to political committees, as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services. See also 11 CFR 114.2(f)(1) (providing that a corporation does not facilitate contributions to a candidate or political committee if it provides services in the ordinary course of business as a commercial vendor at the usual and normal charge). Although VoterVoter.com was formed only a few months ago and does not yet account for a significant part of WideOrbit, Inc.'s business, the operations of VoterVoter.com are a natural outgrowth of WideOrbit, Inc.'s business of making more efficient the TV and radio advertising process. In addition, VoterVoter.com is a way for WideOrbit, Inc. to build on its pre-existing relationship with TV stations to commercial advantage.

1 the purpose of maximizing its commercial success, not for the purpose of supporting
2 candidates.¹²

3 To avoid making a corporate expenditure, an incorporated commercial vendor
4 must charge no less than the usual and normal charge for its services. *See* 11 CFR
5 100.111 and 114.2(b)(2)(i). It appears that the Corporation intends for transactions with
6 respect to each ad to provide a profit with respect to that ad, and not to rely on the profits
7 from some ads to cover losses from other ads. To avoid a corporate expenditure in the
8 normal circumstance where persons pay for the production and airtime costs of their own
9 ads, media vendors customarily price their services so as to rely solely on profits from
10 that transaction to cover costs. The Commission thus conditions its approval of the
11 Corporation's proposal on its representation as to the commercial viability of each ad.
12 *See* Advisory Opinion 2006-34 (Working Assets).

13 The Corporation must also receive confirmation that neither the creators nor the
14 purchasers use funds from prohibited sources to pay for the creation of the ads or the
15 purchase of airtime. *See* Advisory Opinions 2007-04 (Atlatl), 2004-19 (DollarVote), and
16 2002-07 (Careau) (requiring screening and verification procedures to prevent the making
17 of prohibited contributions and to ensure that such contributions are not being
18 forwarded). Although the Corporation will not allow a creator to post an ad if the creator
19 does not confirm that he or she was not paid by anyone else to create or post the content,
20 the Corporation must also receive confirmation that the funds used (if any) in the creation
21 of the ad are not from a source prohibited by the Act, *e.g.*, a corporation, foreign national,

¹² The Commission understands that WideOrbit, Inc., through VoterVoter.com, would also create ads advocating the election of minor party candidates, if the Corporation determines that offering them would increase its net revenues.

1 or Federal contractor. In addition, the Corporation must receive confirmation from the
2 *purchaser* that he or she is not a foreign national or Federal contractor, did not receive
3 funds from another source (unless that purchaser is identified as a co-purchaser), and did
4 not use funds from a prohibited source to purchase the airtime (*e.g.*, through use of funds
5 from another source or use of a corporate account or a credit card not belonging to the
6 purchaser). These confirmations are necessary to ensure that only permissible funds are
7 used to make the independent expenditures.

8 2. *Are costs individuals incur in creating the ads posted on VoterVoter.com exempt*
9 *from the definitions of "contribution" and "expenditure"?*

10 The costs incurred by an individual in creating an ad will be covered by the
11 Internet exemption from the definition of "expenditure" prior to the time the ad is
12 broadcast on television. However, when the ad is broadcast, such production costs
13 would no longer be exempt and would be considered as part of the reportable costs of the
14 independent expenditure.

15 Commission regulations provide that, if an individual or a group of individuals
16 engages in uncompensated Internet activities for the purpose of influencing a Federal
17 election, neither the uncompensated personal services provided by the individual nor,
18 generally speaking, the individual's use of equipment or services for the uncompensated
19 activity will be a "contribution" or "expenditure" by that individual or group of
20 individuals. 11 CFR 100.94 and 100.155. This exemption does not apply to several
21 types of payments, including payments for "public communications." 11 CFR
22 100.94(e)(1) and 100.155(e)(1). However, communications over the Internet are not

1 “public communications,” except for communications placed for a fee on another
2 person’s website. *See* 11 CFR 100.26.

3 The posting by an uncompensated individual or group of individuals of ads
4 created by them on the VoterVoter.com website, where such ads are not posted for a fee,
5 would not be a contribution or expenditure by the individual(s) at the time of the
6 posting.¹³ However, when the ad is broadcast on television (i.e., the date it is publicly
7 distributed), the individual’s costs in creating the ad will no longer be covered by the
8 Internet exemption, and these costs will be part of the expenses for an independent
9 expenditure. *See* 11 CFR 109.10; *see also* 104.4(f) and 100.29(b)(3) (which defines
10 “publicly distributed” for electioneering communications but is also applicable to
11 independent expenditures).

12 Under the proposed business model, the Corporation will not identify the creators
13 of the posted advertisements on the website, and will not indicate whether the creator is
14 an individual or a political committee. In addition, the Corporation will not relay any
15 communications between the creator and the purchaser. Each purchaser must timely file
16 FEC Form 5 and disclose the amount that he or she paid to broadcast the ad. In addition,
17 when the first purchaser of airtime for an advertisement created by an individual pays for
18 the airtime, the Corporation will need to alert the creator that he or she may be under an

¹³ It is also significant that WideOrbit, Inc. and VoterVoter.com have never charged for the posting of any videos or other materials to VoterVoter.com or the WideOrbit website. If they had a customary practice of charging for such posting, the Corporation’s allowance for free posting would constitute an impermissible corporate expenditure. *See* 2 U.S.C. 441b(a) and (b)(2); 11 CFR 100.111(a) and (e), 114.2(b)(2). *See also Internet Rulemaking*, 71 Fed. Reg. at 18599 (stating that that a vendor would make an in-kind contribution to a political committee if the vendor allowed free use of website space outside the vendor’s customary business practice) .

1 obligation to file FEC Form 5 and disclose the total amount of production costs. If a
2 political committee posts an ad it creates on VoterVoter.com, its costs will constitute
3 expenditures and will be reportable as such, even if the ad is never televised because the
4 Internet activity exemptions in 11 CFR 100.94 and 100.155 do not apply to political
5 committees. If the creator is a political committee that has made any payments for the
6 creation of an advertisement that is aired on television, the ad's written and voice-over
7 disclaimers must include the creator as a payor, as well as the purchaser. In addition to
8 stating the name and address (or telephone number) of the person purchasing the
9 particular airtime, the disclaimer must state the same information for the political
10 committee creator, and the ad must include the name of both the purchaser and the
11 political committee creator in the required voice-over and in the written statement of that
12 voice-over. 2 U.S.C. 441d(a)(3) and (d)(2); 11 CFR 110.11(b)(3) and (c)(4); *see also*
13 Advisory Opinion 2007-20 (XM Radio).

14 3. *For the purposes of the definition of "political committee" at 2 U.S.C. 431(4),*
15 *will the Corporation and an advertisement's creator and its purchaser become a "group*
16 *of persons" if there is no communication or prearrangement between the purchaser and*
17 *the creator?*

18 Where there is no communication or prearrangement between the creator and the
19 purchaser of the ad, and the Corporation has not conveyed any information about the
20 creator to the purchaser or *vice versa* (other than the creator's name, address, and costs for
21 reporting purposes), the purchaser may run an ad without the Corporation and the ad's

1 creator and purchaser becoming a “group” for purposes of the definition of “political
2 committee.”

3 The Act and Commission regulations define a “political committee” as “any
4 committee, club, association, or other group of persons which receives contributions
5 aggregating in excess of \$1,000 during a calendar year or which makes expenditures
6 aggregating in excess of \$1,000 during a calendar year.” 2 U.S.C. 431(4)(A); 11 CFR
7 100.5(a). The Supreme Court construed the term “political committee” to “encompass
8 [only] organizations that are under the control of a candidate or whose major purpose is
9 the nomination or election of a candidate.” *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). In
10 addressing a non-profit, incorporated issue advocacy organization that made independent
11 expenditures, the Court stated that, if the organization’s independent spending became so
12 extensive that its major purpose could be regarded as campaign activity, the organization
13 would be a “political committee” and subject to the obligations and restrictions applicable
14 to such groups. *Federal Election Commission v. Massachusetts Citizens for Life*, 479
15 U.S. 238, 262 (1986).

16 If the creator and a purchaser cooperated on the placement of one or more express
17 advocacy communications, they might constitute a “group of persons” whose major
18 purpose was the election or defeat of candidates and hence constitute a “political
19 committee.” Here, under the facts presented, however, it appears that no “political
20 committee” will be created through the Corporation’s activities. The Corporation will
21 not facilitate communications or arrangements between the creator and the purchaser. In
22 addition, the Corporation will not convey (with the exception of contribution information

1 described in response to question 5 at footnote 14) any information to actual or
2 prospective purchasers about the creator, or other actual or prospective purchasers, or
3 previous placements of the ad. Moreover, the Corporation will not convey to the creator
4 any information about the purchasers of an ad, or the scheduling or airing of such ads.

5 4. *If purchasers using VoterVoter.com obtain airtime for an ad that was already*
6 *purchased by other purchasers using VoterVoter.com after reviewing FEC Form 5s filed*
7 *by those other purchasers, are all these purchasers a "group of persons" for purposes of*
8 *the definition of "political committee," even if there is no direct communication or*
9 *prearrangement between the purchasers themselves, and the Corporation has not*
10 *communicated with any purchaser about airtime orders or purchases by others?*

11 Subsequent purchasers of ads may choose to review the FEC Form 5s filed by
12 previous purchasers. However, if there is no communication between or among the
13 purchasers themselves, and the Corporation has not communicated with purchasers about
14 other purchasers, the mere review of FEC Form 5s would not be sufficient to cause
15 previous and new purchasers of the same ad to be considered a "group of persons" and
16 hence a political committee. The Commission does not address whether any
17 communications or collaboration between purchasers would result in the formation of a
18 "group of persons" that could be considered a political committee.

19 5. *If a nonconnected political committee posts an ad on VoterVoter.com that omits*
20 *any mention of the political committee's name, logo, or any other identification, does an*
21 *individual purchaser who pays to broadcast that ad make an in-kind contribution to the*
22 *nonconnected political committee?*

1 Yes, if a nonconnected political committee posts an ad on VoterVoter.com, a
2 purchaser who buys airtime to run that ad would make an in-kind contribution to the
3 political committee that created and posted it.

4 The Commission notes that a person who purchases airtime and runs an ad
5 obtained directly from a political committee would make an in-kind contribution to the
6 committee. The purchaser would enable the committee's ad to be aired, and thus would
7 provide the committee with something of value for the purpose of influencing an election.
8 Similarly, here, the purchaser who buys airtime through the Corporation to run the
9 committee's ad will provide the committee with something of value. The committee will
10 have posted the ad with the intention that another person would pay to have the ad
11 televised, so that the committee itself would not have to spend such funds.¹⁴

12 The Commission notes that, when the ad created by the political committee is
13 posted on the website, the ad is not posted for a fee. Thus, the ad is not general public
14 political advertising, and therefore is not a public communication under 11 CFR 100.26.
15 See 2 U.S.C. 431(22). Accordingly, a disclaimer need not appear on the ad posted on the
16 website. See 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1) and (2).

17 *6a. Does the use of footage of a candidate at a public appearance, in an ad posted on*
18 *VoterVoter.com, constitute republication of campaign materials?*

19 No, if an individual independently creates and uses his or her own footage of a
20 candidate at a public appearance in an ad he or she posts on VoterVoter.com, the footage

¹⁴ When a purchaser informs the Corporation that it wishes to purchase airtime for the ad, the Corporation needs to inform the purchaser that the purchaser would be making a contribution to the particular political committee, subject to the Act's limits. See 2 U.S.C. 441a(a)(1)(C). If the purchase is actually made, the Corporation also needs to inform the political committee of the contribution date, amount, and the contributor's identifying information. See 11 CFR 104.3(a)(4).

1 would not constitute candidate campaign materials. Hence its use would not constitute
2 republication of campaign materials by either the creator or a subsequent purchaser of
3 airtime for the ad.

4 The Act and Commission regulations provide that, with limited exceptions not
5 implicated here, the dissemination, distribution, or republication, in whole or in part, of
6 campaign materials prepared by a candidate or the candidate's authorized committee, is a
7 contribution by the person republishing the campaign materials for the purposes of the
8 Act's limitations and his or her reporting responsibilities, regardless of whether such
9 republication is a "coordinated communication." 2 U.S.C. 441a(a)(7)(B)(iii); 11 CFR
10 109.23.¹⁵ Here, as long as the creator is acting on his or her own behalf in creating the
11 footage and neither the candidate nor his or her authorized committee, or any agent acting
12 on behalf of either, would have any ownership or other rights to the footage, the ad would
13 not constitute the dissemination, distribution or republishing of campaign materials.

14 *6b. Would this analysis change if the footage includes images of campaign materials,*
15 *such as banners, signs, buttons, or t-shirts, either in the background or worn by the*
16 *candidate at the event?*

17 No. If the footage includes images of campaign materials, such as campaign
18 signs, buttons, or t-shirts with slogans, at the public appearance, the use of the footage
19 would not thereby become a republication of campaign materials.

¹⁵ When a creator posts an ad on the website, the Corporation must ask the creator whether the ad posted constitutes a republication. If it does, the Corporation needs to inform: (1) political committee creators that the production costs will be a contribution to the candidate subject to the Act's limits; and (2) persons deciding to purchase airtime for the ad that their purchase would be a contribution subject to the Act's limits. In addition, if the republication is both a public communication and a coordinated communication, it may need to be reported by the candidate as well. See 11 CFR 109.21(a), (c)(2), and (d)(6) and 109.23.

